FILE

Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1961.

HAROLD GROSS, also known as HARRY GROSS, *Petitioner*, v. UNITED STATES OF AMERICA	No. ....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Harold Gross, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on January 31, 1961.

OPINIONS BELOW

There was no opinion in the District Court. The opinion of the Court of Appeals (Magruder, Waterman and Friendly, Circuit Judges) has not yet been reported. A copy of the slip opinion is affixed hereto as Appendix A.

On the question of venue, hereinafter referred to, the Court of Appeals adhered to its view as expressed in the former trial of this case, *U. S. v. Harold Gross*, 276 F. 2nd 816 (2nd Cir., 1960). A copy of the pertinent portion of that opinion is affixed hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on January 31, 1960 (*infra*, Appendix A). A petition for rehearing was denied on February 21, 1961 (*infra*, Appendix C). A motion to stay the mandate for a period of 30 days pending the filing of this petition was allowed on March 6, 1961.

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a 'prosecution' for willful evasion of payment of income taxes, the Government's burden of proving venue is satisfied by proof only that an unsigned return was prepared in the Southern District of New York.

2(a). Whether, the trial court failed to instruct the jury as to the defendant's "Theory of Defense".

(b). Is it proper for a Court of Appeals to determine that a comparison of "Not Guilty" verdicts on accompanying counts is proof that the defendant was not prejudiced on "Guilty" verdicts.

3. Whether, in a prosecution for the willful evasion of payment of income taxes, that included evidence of a substantial part of the alleged monies being passed on to other people, the trial court erred in refusing to instruct the jury as to the definition of the term "income".

4. Whether a motion for a mistrial should have been granted because of United States Attorney's comment that intimated defendant had committed a similar offense on a date prior to the dates alleged in the indictment.

5(a). Whether the trial court erred in failing to answer in the negative a jury question as to the permissibility of separating verdicts as to amounts alleged to have been evaded in individual counts.

(b). Whether the trial court erred in declaring an "assumption" as to what facts the jury was finding, after they had been deliberating for some twelve hours.

STATUTES AND CONSTITUTIONAL PROVISIONS

18 U. S. C. 3237, providing that "Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed."

U. S. Constitution, Amendment 6, providing that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . ."

STATEMENT OF THE MATTER INVOLVED

In an indictment, in six counts, the defendant was charged with attempting to evade payment of income taxes for each of the years 1953 through 1958 by preparing and causing to be prepared and by filing and causing to be filed returns which understated his true income, in violation of Section 145(b) of the Internal Revenue Code of 1939 (as to the year 1953), and of Section 7201 of the Internal Revenue Code of 1954 (as to the years 1954 to 1958).

At the conclusion of the evidence the defendant moved for a directed verdict of acquittal in accordance with Rule 29 of the Federal Rules of Criminal Procedure, "... on the ground that the Government had not established venue". The motion was denied.

The Government claimed that in each of the years 1953 through 1958 the defendant had received an annual payment of $4,000.00 in cash, and additionally, in the years 1954 and 1955 (Counts II and III) had received a payment of $2,500.00, and these payments had not been reported by the defendant.

The only evidence introduced by the Government to support venue in the Southern District of New York was the testimony of a public accountant whose office was located in that District. He received the information from which he prepared the returns through the mail and then mailed the unsigned return to the defendant. He received payment for preparing the return through the mail and had no knowledge of any monies received by the defendant that were not reported on the returns.

No other action of the defendant was alleged to have taken place in the District in which this case was tried.

The evidence introduced by the Government to support the payments as having been made was substantially as follows:

The General Manager and Vice President of Neo-Gravure Printing Co. (Chenicek) who testified that the defendant was foreman of the shipping department of the Neo-Gravures; that Neo-Gravure's chief product is the printing of newspaper supplements; that in 1951 Neo-Gravure's parent company signed a ten-year printing contract with the "American Weekly" providing that the first delivery be made May 11, 1952, to the "Journal American" newspaper; that he heard a rumor of there

being some difficulties in effecting the delivery of the first issue; that because the defendant was foreman of the shipping room, he called him to ask what he knew of the situation; the defendant told him he knew nothing, but would check into it; a few days later the defendant returned and said that for the payment of $4,000.00 per year to him for the life of the ten-year contract any difficulty with delivery could be avoided; that the defendant told him that the $4,000.00 had to be spread around through various hands; that he instructed the company treasurer (Hillbrant) to make the cash payments to the defendant; that in 1954 he requested the defendant to help negotiate a two-year contract for platform workers with the New York Teamsters Union; that he instructed the treasurer of the company to make a cash payment of $2,500.00 in 1954 and 1955 in return for the defendant's assistance in negotiating the contract.

2. Mr. Hillbrant, Treasurer of Neo-Gravure, testified that he received instructions from Mr. Chenicek to make the cash payments to the defendant; that he drew checks to cash and handed the money to the defendant; that he purposely kept his books in a manner calculated to keep the payments secret; that the books of Neo-Grayure were kept in such a manner so as to not indicate to whom the monies were being paid or the reason for the payment; that the books could have been kept in such a manner to indicate why the two $2,500.00 payments were being made, but he didn't think of any manner in which to do it at the time.

The defendant did not testify, but did introduce evidence that Mr. Chenicek had told the business manager of the "American Weekly" that the $4,000.00 payments were being made to pay employees on their loading platform. During the cross-examination of Hillbrant concerning details of the $4,000.00 cash payment the witness made an answer

concerning a payment outside the scope of this indictment. After defendant's motion to strike the answer the United States Attorney made the following comment, "I don't know, I think there can be some explanation to this. He may have received some money at other times". Thereupon, the defendant moved for a mistrial. The motion was denied.

At the conclusion of the evidence, the defendant informed the Court that he would rely on, as his "Theory of Defense", the fact that the $4,000.00 payments were passed on to other persons, and requested an instruction to the effect that if the jury found the defendant received the $4,000.00 payments but paid it out to others than it should not be considered as income to the defendant. This request was denied. The defendant also requested an instruction that the term "income" be defined for the jury. This was also denied.

After deliberating for some hours the jury returned to ask whether "regarding Counts 2 and 3 (1954-1955) can a verdict be rendered separating the alleged $4,000.00 and $2,500.00 payments in each count". The trial judge repeated that part of his charge concerning their necessity of only finding a substantial amount was evaded.

After some twelve hours of deliberation the jury returned to ask: "Can you give us a legal interpretation of what constitutes a substantial amount with regard to Counts 2 and 3". The trial judge repeated for a third time, an instruction defining a substantial amount, but also added that he was assuming that some or all of the jurors felt that the defendant had understated his income.

Within ten minutes of the answer to this last question the jury returned verdicts of "Guilty" on Counts 2 and 3.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided important Federal questions in a way in conflict with applicable decisions of this Court and the United States Constitution.

I.

Proper venue is an absolute right of the defendant in a criminal case, which is safeguarded by the provisions of the Sixth Amendment requiring that the criminal trial shall be before an impartial jury of the "State and District wherein the crime shall have been committed".

The Court of Appeals incorrectly applied the cases of *United States* v. *Johnson*, 323 U. S. 273 (1944), and *Travis* v. *U. S.*, — January 16, 1961 — , in its determination that venue was proper in this case.

Although it is correct that the Court in *United States* v. *Johnson, supra*, said, "By utilizing the doctrine of a continuing offense, Congress may . . . provide that the locality of a crime shall extend over the whole area through which force propelled by an offender operates", it is also obvious that the Court was thinking in terms of the commission of a crime wherein Congress specifically provided that venue lay in multiple districts. This is apparent in the Courts emphasizing, at page 275:

> "It is significant that when Congress desires to give a choice of trial, it does so by specific venue provisions giving jurisdictions to prosecute in any criminal court of the United States through which process of wrongdoing moves. Such was the situation in *Armour Packing Co.* v. *U. S.*, 209 U. S. 56. The offense there was under the Elkins Act for the transportation of goods, at illegal freight rates, and Congress specifically provided for prosecution in any

> district through which the transportation may have been conducted."

In the instant case the defendant lived in a District other than that in which he was tried for this offense. His return was filed in a Second District, other than the one he was tried in and the actions complained of in obtaining the alleged unreported income were committed in still a Third District other than the one in which the case was tried.

It was only the *chance selection* of an accountant in the Southern District of New York, that the Court of Appeals suggests is sufficient to give that District venue. If the Court of Appeals is correct than the chance use of the mails in forwarding the information for the return to an accountant across the country would then give the Government an election to try this case in each District through which the information passed and ultimately rested. We respectfully suggest that such a conclusion is directly contrary to the reasoning expressed by this Court in the recent case of *Travis* v. *United States*, January 16, 1961.

In *Travis* v. *United States*, *supra*, the Government contended that an affidavit signed and mailed was an offense "begun" in that District in violation of the "false statement" Statute (18 U. S. C. para 1001) and that the defendant had, thereby, irrevocably set in motion and placed beyond his control the train of events which would normally result (and did result) in the consummation of the offense. In response to this argument the Court held, at Page 5 of the majority opinion:

> "We do not agree with this analysis, venue should not be made to depend on the chance use of the mails when Congress has so carefully indicated the *locus* of the crime. After mailing, the affidavit might have been lost; petitioner himself might have recalled it. Multiple venue in general requires crimes consisting

> of 'distinct parts' or involving 'a continuously moving act'." *United States* v. *Lombardo*, 241 U. S. 73, 77.

The rationale of both *Travis* v. *United States, supra*, and *United States* v. *Lombardo, supra* is that an irrevocable substantive act must be committed within the jurisdiction in which the case is to be prosecuted. We submit that rationale as applicable to the instant case. The only "action", so called, that could be considered as having been committed by this defendant in the Southern District of New York was in authorizing an accountant to prepare an unexecuted return.

The constitutional requirements of venue should not be considered as satisfied by such capricious and whimsical action.

II

a) It is well established that the defendant in a criminal case is entitled to have the jury instructed as to his "Theory of Defense." If the issue is an essential one, the jury must be instructed regarding it, even though there is no request made by the defendant. "In a criminal case, the Court must instruct on all the essential questions of law involved, whether or not it is requested to do so." *Samuel* v. *United States*, 196 F. 2nd, 787, 9th Cir. (1948). This requirement was set forth in some great detail in the case of *Tatum* v. *United States*, 190 F. 2nd, 612, E. C. (1951).

> "In criminal cases, the defendant is entitled to have presented instructions to a "Theory of Defense" for which there is any evidence, even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility."

The evidence produced at this trial clearly indicated that the only defense to the commission of the defenses was that

the $4,000.00 payments were passed on to other persons, and that the credibility of Government witnesses as to the $2,500.00 payments was such as to be unworthy of belief.

The Court of Appeals incorrectly diminished the import of the singleness of the defense by referring to defendant's denial of receipt of all payments, at the first trial of these matters, as presenting an alternate defense, i.e., that he did not receive the payments, but if he did receive them that he passed them on to other persons. In addition, the Court of Appeals in determining that there were alternate defenses inappropriately made reference to statements by defendant's counsel in his opening. It is obvious that statements of counsel in an opening are not to be considered as evidence in a trial of a case, and it is respectfully submitted that the Court of Appeals clearly went far beyond the scope of the evidence presented to the jury in this case, in making reference to defendant's testimony at a prior trial.

The defendant did not testify at this trial.

At the conclusion of the evidence the defendant filed a request for an instruction to the effect that monies that were passed on to other persons should not be considered by the jury as income to this defendant. The Court of Appeals in its decision, at Page 671, assumes that the trial judge understood what the instruction mean, and states, ". . . and although he could properly have instructed that amounts which defendant received but passed onto others would not warrant conviction for understatement of net income tax it was not error for him to fail to do this in the light of the charge actually given. . . ."

The only portion of the Judge's charge, even remotely concerned with monies having been passed on to other persons is quoted by the Court of Appeals at Page 669 of its opinion.

"If you find that the defendant received the sums alleged in the indictment and retained a substantial portion for his own account, which he willfully failed to report, he then may be found guilty of the crime charged notwithstanding he may have passed on to others a portion of the monies received."

We submit the above quote as being correctly described as an instruction as to the Governments, "Theory of Prosecution" rather than one setting forth the defendants, "Theory of Defense."

At the completion of the charge, the defendant objected to the Court's failure to clarify the crucial issue, and again requested that the jury be instructed as to his, "Theory of Defense". The request was again denied, and the denial was accompanied by the Judge's comment that the jury could infer what the defense was:

"The Court: I think that the portion of the charge which I just read and which appears to be the portion that counsel refers to has implicit in it that if they don't find that he retained the substantial portion for his own account, that then they may not return a verdict of guilty. If in every instance you have to give them both sides of it, it would just be confusing.

Would you like to read this again and satisfy yourself as to whether it isn't fairly implicit in it because if you don't think it is fairly implicit in it, I am concerned" (100a).*

The facts of this case did not indicate the amount allegedly unreported consisted of a number of small or trivial omissions totaling the amounts named in the indictment. To the contrary, the Government sought to establish only two series of transactions: (1) in the single amount of $4,000.00 for each of the years and (2) in the additional amount of $2,500.00 for the years 1954 and 1955. None-

*Parenthetical page references followed by symbol "a" signify Appellant's Appendix.

theless, the Court failed to instruct as to the only theory of defense, and instead, instructed as to an abstract proposition having little or no relation to the defendant's legal theories in this case.

b) The Court of Appeals bolsters its determination that the Judge's charge did not result in prejudice to this defendant, by incorrectly comparing verdicts.

At page 671 of its opinion the Court of Appeals states, "Moreover, the verdict affords the clearest proof that no prejudice occurred, F. R. Crim. Proc. 52(a)."

This conclusion could only be arrived at by comparing the verdicts of "Not Guilty" on the four counts that only included the $4,000.00 payments with the two verdicts of "Guilty" on the counts that also included the $2,500.00 payments and, assuming as a result, that even if the jury was not correctly charged there could be no prejudice.

We submit it is pure speculation to decide that a comparison of verdicts warrants a conclusion of no prejudice as defined in F. R. Crim. Proc. 52(a).

Even where obvious inconsistencies in verdicts were to the defendant's advantage, the Courts have held that you cannot speculate as to the jury's exercise of its functions. In *Dunn* v. *United States*, 52 S. Ct. 189, 1932, the Court, speaking through Holmes, J., held,

> ". . . Each Count in an indictment is regarded as if it was a separate indictment. *Latham* v. *the Queen*, 5 Best & Smith, 635, 642, 643; *Sylvester* v. *U. S.* 170 U. S. 262, 18 S. Ct. 580, 52 L. Ed. (1029). If separate indictments had been presented against the defendant for possession and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as res judicate of the other. Where the offenses are separately charged in the Counts of a single indictment the same rule must hold. . . ."

It is no more appropriate to bolster a verdict of "Guilty" by comparison with "Not Guilty" Counts than it would be to suggest a jury was illogical in a verdict of "Guilty" by assuming its thinking in its returning "Not Guilty" verdicts.

There are many decided cases indicating the Court's disapproval of "comparing" verdicts even though there is no rationale way of reconciling what the jury has returned.

> "That the conviction may have been the result of some compromise is, of course, possible; but to consider so is to consider too curiously, unless all verdicts are to be upset on speculation . . ." *Steckler* v. *U. S.*, 7 Fed. 59, 2d Cir. (1925).

And in *Carroll* v. *U. S.*, 16 F. 2d 951, 2d Cir. (1927)

> ". . . But each Count in an indictment is to be considered as a distinct and separate indictment and the verdict on one count, which is consistent with it, is not invalid with the verdict of the jury on another Count. We have theretofore announced that we do not hold jurors to rules of logic . . ."

This view also finds support in other jurisdictions.

> "Consistency in a verdict is not necessary since each count in an indictment is regarded as if it were a separate indictment." *Dozeman* v. *U. S.* (C. C. A. 8th Cir., 157 F. 2d 738 (1946), also see *Young* v. *U. S.*, 169 F. 2d 24, 10th Cir. (1948).

It would appear well decided from the foregoing citations that a defendant cannot compare verdicts to show that he was prejudiced.

We submit, therefore, it is likewise inappropriate for this Court to adopt the Principle that lack of prejudice in these two verdicts of "Guilty" can be shown by comparing the verdicts with those of "Not Guilty".

The fact of the matter is that on the two Counts on which the defendant stands convicted, this jury was at no time instructed that the evidence would warrant their excluding the $4,000.00 payment, from consideration and then determining whether they felt the remainder was the retention of a "substantial" amount. We do not suggest that the $2,500.00 payments could not have been a substantial amount. We do submit that it is only speculation as to what the jury might have found had they been correctly charged.

III

At the conclusion of the evidence, the defendant filed a request for an instruction that the jury be instructed as to the definition of the term "income" (82a, 83a). In denying this request the Court commented:

> "I don't think I am going into any treatise on the tax laws as to what constitutes income except as to whether the income was lawfully or unlawfully obtained, the law states it is taxable income."

A major issue in the trial of this case was whether monies allegedly received by this defendant were passed on to various persons. The defendant pointedly refused to acknowledge that mere receipt of these monies was sufficient to constitute income. This is evidenced by the following colloquy between defense counsel and the trial court at a bench conference during the trial (57a).

> "The Court: Then there would be additional taxable income. That now involves this, and I wanted to ask you, because I am working on my charge, that if the jury finds these monies were paid to him, that then constituted taxable income to him?"
> Mr. Balliro: "No, I don't agree with that one bit."
> The Court: "You don't?"
> Mr. Balliro: "Absolutely not, sir."

> The Court: "Alright. You shall have the opportunity to take your exception at the proper time."

The fact of the matter is that the Court did not charge as was suggested in its foregoing statement.

The Court of Appeals agrees that the judge ". . . could properly have instructed that amounts which defendant received but passed on to others would not warrant conviction for understatement of net income and tax . . .", but suggest that in the light of the charge given there was no error. It also did not feel that this claim of error required discussion.

As has been heretofore discussed, the only defense with regard to the $4,000.00 payments contained in these courts was that the money was not income to this defendant who was acting, in effect, as merely a conduit though whom the money was passed on to others.

That mere receipt of monies does not compel the conclusion that those monies are taxable income is well settled. *In Commissioner of Internal Revenue* v. *Wilcox*, 327 U. S. 404, 66 S. Ct. 546 (1946), the court said at page 548:

> "The Internal Revenue Code defines 'gross income' to include 'gains, profit and income derived from . . . dealings in property . . . growing out of the ownership or use or interest in such property; also found . . . the transaction of any business carried for gain or profit, or gains or profits and income derived from any source whatsoever. . . .'"

and again at page 548:

> ". . . The very essence of taxable income, as that concept is used in Section 22 (A), is the accrual of some gain, profit, or benefit to the taxpayer. This requirement of gain, of course, must be read in its statutory concept. Not every benefit received by a taxpayer from his labor or investment necessarily

> renders him taxable. Nor is mere dominion over money or property decisive in all cases. In fact, no single, conclusive criterion has yet been found to determine in all situations what is a sufficient gain to support the imposition of an income tax . . ."

We submit that the evidence above referred to clearly focused the issue of whether this defendant had received any gain or profit within the meaning of 26 U. S. C. 61, and the jury should have been so instructed.

> *Central Life Assur. Soc. Mut.* v. *C. I. R.*, 51 F. 2nd 939, 8th Cir. (1931);
>
> *Kcok* v. *Hamilton Bridge* v. *Commissioner of Internal Revenue*, 180 F. 2nd 58, 8th Cir. (1950);
>
> *Commissioner of Internal Revenue* v. *Wilcox*, *supra*.

The court's failure to apprise the jury by means of instruction as to what could be considered as "income" to the defendant left the jury with no yardstick upon which it could measure the question of whether the receipt of these monies, standing alone, was such income. *In Morris* v. *U. S.*, 156 F. 2nd 525, *the court at page 529 said*,

> "The charge to the jury should not leave the jurors in ignorance of, or leave them to their conjecture as to what constitutes the offense charge."

IV

The Court of Appeals saw fit to reject a claim of error based upon an extemporaneous comment made by the United States Attorney during defendant's cross-examination of a government witness, (Hillbrant).

A brief review of the facts leading up to this comment is necessary for an understanding of the seriousness of this alleged error:

Mr. Hillbrant was the treasurer of the Neo-Gravure Printing Company. He had testified, on direct examination, concerning his paying, in cash, both the $4,000.00 and $2,500.00 payments to the defendant. He had testified similarly at the prior trial of this defendant. He had testified also about these matters before two State Grand Juries, One Federal Grand Jury and the "McCellan Committee" hearings.

The official transcript of Hillbrant's testimony before the "McCellan Committee" indicates that in addition to testifying about these payments, the witness testified to cash payments allegedly made to the defendant in the year "1948". *The transcript of that testimony was on the desk of the United States Attorney throughout the both trials of this defendant.* The contents of the testimony before the "McCellan Committee" was used by the United States Attorney in the cross-examination of two of the defendant's witnesses.

The record will show that the defendant had begun his cross-examination of the witness Hillbrant with the years here in issue (46a, 47a):

> Q. (By defense counsel) This was a $4,000.00 cash payment, wasn't it, Mr. Hillbrant?
> A. Yes.
> Q. Don't you remember how that payment was made, this $4,000.00 payment?
> A. Unquestionably it was wrapped up at the time. It wasn't loose, and I offered to count it. I don't know that he counted it, but he got the money.
> Q. Then you did have some conversation with him in which you offered to count the money.
> A. Yes.

Q. Is that correct?
A. I don't think there is any question about it always.
Q. There was a conversation that you had with him about counting the money?
A. When I handed him the money and told him here it is, offered to count it, he would say yes or no, sometimes he would not count it.
Q. In 1954 did he count it?
A. I don't know.
Q. Would he count it there in your office, Mr. Hillbrant, on the occasions when he did count it?
A. *I am going to be frank with you, I think just once did he count it.* (italics added)
Q. When?
A. 1948.

Mr. Balliro: I ask that that be stricken from the record. May we approach the Bench?

Mr. Gillespie: I don't know. I think there can be some explanation to this. He may have received some money at other times.

Mr. Balliro: I ask that the trial be declared a mistrial, may it please the court.

The Court: The comment will be stricken but the motion for a mistrial is denied.

It is true that the witness's answer was to the specific question "when". But, in the light of the previous questioning and this witness's declaration that he was going to be "frank with you" this certainly cannot be considered a responsive answer.

The difficulty in removing prejudice from the minds of a jury is too well settled to require citation. The trial judge did little to remove the prejudice inherent in this remark. Although he admonished the jury to disregard the remark, he permitted the answer "1948" to remain in the record, and in doing so stated to the jury (49a):

"This witness was asked a specific question and made a specific answer, a totally responsive answer to a particular question. . . ."

It is extremely difficult to convey the prejudice created by the United States Attorney remark, by only making reference to the printed transcript. Without desire to be considered as attempting to persuade the court of the merit of our contention by the undue use of superlatives, we nonetheless feel that fairness to the defendant requires that we describe the effect of this "comment" on the jury as electrifying. It carried with it the unmistakable, but unwarranted, connotation that this defendant had committed a similar offense in the year 1948; a year that had not even the remotest connection with this indictment.

In *Berger* v. *United States*, 295 U. S. 78, 88, this court, in ruling upon gratuitous statements made by the government which were not warranted by the evidence, said:

> "The U. S. Attorney is a representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it should win a case, but that justice should be done. As such, he is in a peculiar and very definite sense a servant of the law, the two-fold aim of which is that guilty shall not escape or innocence suffer. He may prosecute with earnestness and vigor, indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a fair one.
>
> "It is fair to say that the average jury, in a greater or lesser degree, has confidence that these obligations, which so plainly rest upon the prosecut-

ing attorney, will be faithfully observed. Consequently, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

V

(a) After several hours of deliberation, the jury returned to the courtroom for an instruction regarding the following matter, "Regarding counts 2 and 3 (1954-1955) can a verdict be rendered separating the alleged $4,000.00 and $2,500.00 payments contained in each count."

Counts I, IV, V and VI of the indictment alleged a $4,000.00 difference between what the defendant had reported as income and the government claim as to his income.

Counts II and III of the indictment were similar in all respects except the difference between income reported by the defendant and that claimed by the government amounted to $6,500.00.

The proof offered by the government regarding counts II and III consisted, for each of those years, of a $4,000.00 payment and a separate $2,500.00 payment. It is significant however, to note that the indictment for those years did not separate the $6,500.00 omission into two payments.

The trial judge, over objection of defense counsel answered the Jury in the following manner (101a)

> "The Government need not establish that the alleged unreported income of the defendant and the taxes due thereon coincide precisely with the (788) amounts stated in the indictment. It is necessary only that it be established to your satisfaction beyond a reasonable doubt that a substantial amount of the taxes alleged to be due was in fact due.
>
> "Thus, if you find that the defendant did receive a substantial part of the income alleged in the indictment and that he further wilfully failed to report

> such income or wilfully filed false returns with the intent to evade the tax on such income, you should find him guilty on a count or counts of the indictment to which such findings, if you make them relate."

We submit the Court's answer to the question asked by the Jury was not responsive. It is patent that an indictment framed as in Counts II and III cannot be emasculated by separating the amount alleged therein.

The jury could not exercise the prerogative of returning a verdict of guilty to part of the indictment—and should have been so instructed by the Judge.

As stated in *Bollenbach v. U. S.*, 326 U. S. 607, 66 S. Ct. 402:

> "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy."

(b) Inherent in the authority given to a Federal Court Trial Justice to instruct a jury with regard to proper law and how it shall be applied to the facts, is the opportunity to be of great assistance in their determination of the issues. The authority, however, if misused, carries with it the potential danger of substantial harm.

In the case at bar, after some twelve hours of deliberation, the jury asked to be instructed as to the following matter:

> "Can you give us a legal interpretation of what constitutes a substantial amount with regard to counts 2 and 3?"

The defendant objected to the court's proposed answer and the judge then accompanied his instruction to the jury with the following comment (105a).

> "I take it, and I don't want any response, any indication, I take it there is some amounts some people feel I have been understated or all people feel he been understated and that amount is less than the amount claimed by the Government. Then your question as to whether the amount you find, if any—I am not suggesting by any inference, that you did find or should find—I feel that is probably the reason for the question—against the background of the charge that I gave you that the Government doesn't have to prove the precise amount alleged in the indictment."

We submit that this comment was non-responsive to the question asked by the jury, was not material to the court's understanding of the question posed, could not have assisted the jury in understanding the instruction given—and, instead, was fraught with prejudice.

> "When a jury makes explicit its difficulties a Trial Judge should clear them away with concrete accuracy."
>
> *Bollenbach* v. *U. S.*, 326 U. S. 607 (1946).

The jury's dependence on the trial judge for guidance is pointed out in *Bollenbach* v. *U. S.*, *supra*:

> "... Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depends on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria."

That matters not material to the court's consideration of the jury's problems, should not be referred to by the trial court, is well decided. Where the trial court had inquired of the jury as to how it was divided, this Court said in *Burton* v. *U. S.*, 196 U. S. 283, 307:

> "... such a practice is not to be commended, because we cannot see how it may be material for the court

> to understand the proportion of division of the opinion of the jury . . . and we do not think the proper administration of law requires such knowledge or permits such a question on the part of the presiding judge. Cases may easily be imagined where a practice of this kind might lead to improper influences, and for this reason it ought not to be obtained." (Emphasis supplied)

The court has placed particular emphasis, when, as in the instant case, the impropriety occurs immediately prior to the case being submitted to the jury:

> "No one can know for certain what a given portion of a charge does to the collective minds of the jury but this particular point complained of was in a charge made after the jury had been recalled and constituted the last thing they were told when they retired to consider their verdict."

United States v. *Martell*, 199 F. 2nd 670, 3rd Cir. (1952)

Where the jury had deliberated for a substantial length of time and then returned with a verdict of guilty five minutes after receiving an improper instruction, the Court found that their quick verdict was indicative of the harm that can result:

> "We can pay no attention to this misdirection only by assuming that the jury paid no attention to it and that the case is before us as though no misdirection had been given. To do so is to disregard the significance of the course of events, as revealed by the record, after the case went to the jury . . ." (The jury returned a guilty verdict five minutes later.)

In the instant case, after having deliberated for some twelve hours, the jury returned guilty verdicts, within ten

minutes of the trial court's "assumption" as to the facts the jury was finding.

The trial judge, in making this needless comment, went far beyond the prejudice created in asking the jury how they stand on a particular issue; he "assumed" the truth of something that was very much in issue, namely: whether or not "some" or "all" of the jurors felt that the defendant had understated his income.

In *Brasfield et al. v. United States*, 272 U.S. 448 even though the defendant failed to take an exception to the trial court's inquiry as to the numerical division of the jury, the Court held:

> "We deem it essential to the fair and impartial conduct of the trial that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot be properly known to the trial judge or to the appellate courts, and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious, although immeasurable, an improper influence upon the jury from whose deliberations every consideration other than of the evidence and the law as expounded in a proper charge should be excluded. . ."

There was nothing in the question as posed by the jury that indicated all of them felt that the defendant had understated his income to some degree.

We can only speculate as to what harm was created when, after some twelve hours of deliberation, the court needlessly made this unwarranted assumption.

CONCLUSION

This petition for a writ of Certiorari should be granted.

Respectfully submitted,

DONALD N. MURTHA
JOSEPH J. BALLIRO
ROBERT A. FREEMAN

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

(Argued January 6, 1961; Decided January 31, 1961)

PER CURIAM:

This appeal is from a judgment of conviction upon the retrial directed in *United States* v. *Gross*, 276 F. 2d 816 (2 Cir. 1960), cert. denied on defendant's petition relating to venue, 363 U. S. 831 (1960). This time Gross was convicted only on Counts II and III, relating to understatement of net income and of tax in the returns for 1954 and 1955. These were the years as to which the government offered evidence of payments of $2,500 to Gross for assisting his employer, Neo-Gravure Printing Co., in bargaining negotiations with Local 1730, I. L. A., the representative of Neo-Gravure's platform workers, in addition to the $4,000 payments for preventing work stoppages feared if truck drivers of the New York Journal American attempted to make pick-ups of the American Weekly at Neo-Gravure's loading platform. He was acquitted on Counts I, IV, V and VI, relating to years for which only the $4,000 payments were claimed. Appellant again presses his objection to venue in the Southern District of New York; as to this we adhere to the view stated in our previous opinion for we do not find that *Travis* v. *United States*, — U. S. — (1961), leads to a contrary conclusion.

The government's evidence at the second trial paralleled that at the first; but whereas at the former Gross had taken the stand and denied receipt of the payments, he did not testify when retried, although his counsel had stated in opening that "We intend to introduce evidence that he

never received moneys that the Government, through its proof, is going to attempt to prove to you that he did receive." Attempts were made, both by cross-examination of the government's witness Chenicek and by the testimony of Fontana, business manager of the American Weekly, to present the alternative defense that the six annual installments of $4,000 were paid over by defendant to the platform workers, Gross being merely a conduit. Nothing similar was developed in regard to the two $2,500 payments in 1954 and 1955.

The judge instructed the jury that "the Government need not establish that the alleged unreported income of the defendant and the taxes due thereon coincide precisely with the amount stated in the indictment" and that "It is necessary only that it be established to your satisfaction beyond a reasonable doubt that a substantial amount of the tax alleged to be due was in fact due." He also charged:

> "If you find that the defendant received the sums alleged in the indictment and retained a substantial portion for his own account, which he wilfully failed to report, he then may be found guilty of the crime charged notwithstanding he may have passed on to others a portion of the moneys received."

After deliberating for some hours, the jury returned to ask whether "Regarding Counts 2 and 3 (1954-1955) can a verdict be rendered separating the alleged $4000 and $2500 payments contained in each count?"; the judge repeated his instructions with regard to substantial amount. Still later the jury asked, "Can you give us a legal interpretation of what constitutes a substantial amount with regard to Counts 2 and 3?" Defendant's counsel requested that this be answered in the negative. Instead, the court instructed that "substantial amount * * * cannot be defined in absolute terms" but "depends upon the facts and circum-

stances in each case" and that the jury must determine in that light whether "such understatements, if any, as you may find to have been made, if any, with respect to the years covered in Counts 2 and 3, constitute substantial amounts of understatements." The jury then found defendant guilty on Counts II and III and not guilty on Counts I, IV, V and VI.

We find no error in Judge Bicks' instructions. The two $2,500 payments were substantial enough in relation to Gross' total income to negate any possibility of omission through neglect or oversight, *United States* v. *Nunan*, 236 F. 2d 576, 585 (2 Cir. 1956), cert. denied, 353 U. S. 912 (1957); hence defendant cannot successfully complain because the judge left the question of substantiality to the jury as he did. Neither do we find error in the court's refusal to give certain instructions sought by the defense. One of these, submitted in writing pursuant to F. R. Crim. Proc. 30, was:

> "If you find that the defendant received the money, but that the defendant did not retain the money for his own use, then the money received did not constitute income to the defendant, and you must find the defendant not guilty."

It was right to refuse this since there was no evidence even suggesting that defendant had not retained the two $2,500 payments if he had received them. Defense counsel then asked orally that the court charge

> "* * * that if the jurors find that he received the money, that he did not retain the money for his own use and it was paid to someone else, that the charge be confined to the $4000 payments and not the $2500 payments."

Even though we assume the judge understood what he meant, and although he could properly have instructed that amounts which defendant received but passed on to others would not warrant conviction for understatement of net income and tax, it was not error for him to fail to do this in the light of the charge actually given, *Eckert v. United States*, 231 F. 2d 928 (9 Cir. 1956). Moreover, the verdict affords the clearest proof that no prejudice occurred. F. R. Crim. Proc. 52(a).

We have reviewed all the other claims of error; no discussion of any of them is required, save to reject the attack on the United States Attorney, whose conduct, after defense counsel had elicited an answer damaging to defendant by a broad question to a government witness, appears to us unexceptionable.

Affirmed.

APPENDIX B.

U. S. v. Harold Gross, 276 F. 2nd 816 (2nd Cir., 1960)

EXCERPT FROM THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Because of the issue of venue raised by Gross on this appeal, it becomes necessary to state how his tax returns were prepared and filed. In 1952 Gross requested Michael Pinto, an accountant having an office in the Southern District of New York, to prepare his income tax returns for 1951. Pinto asked for documentary evidence of Gross' income. Gross submitted his W-2 forms. Pinto could not recall whether Gross had submitted any other documents but "was satisfied that he submitted to me all the income that he had to report." For each of the years here in question, Pinto received similar information from Gross in Pinto's office in the Southern District. Pinto there prepared the returns in his own handwriting, signed them under the rubric "Preparer" (except for the 1953 return), and mailed them to Gross, who signed and filed them without change. Until the fall of 1958 Gross lived in Forest Hills, L. I., and the returns for 1953-1957 were filed in the Eastern District of New York; in October, 1958, he moved to Miami Beach and his 1958 return was filed in Florida. After Pinto had prepared the returns and sent them to Gross, "a truckdriver or somebody who seemed to look like a truckdriver" would come to Pinto's office with Pinto's fee. The government does not claim Pinto knew of Gross' alleged tax evasion.

After both sides had rested, defendant moved for a directed verdict of acquittal under Fed. R. Crim. Proc. 29. The Court reserved decision. The jury found defendant guilty on all counts. Thereafter defendant renewed his motion for acquittal "on the ground that the evidence is

insufficient to sustain a conviction of the offenses charged," for arrest of judgment under Fed. R. Crim. Proc. 34 "on the ground that the court is without jurisdiction of the offense in that the offenses, and each of them, if any, were not committed in this district," and for a new trial under Fed. R. Crim. Proc. 33. All motions were denied. The court sentenced Gross to five years' imprisonment on each count, the sentences to run concurrently.

Gross contends the District Court erred in not granting his motions for acquittal and for arrest of judgment on the ground of improper venue; the government answers, *first*, that Gross waived any objection to venue and, *second*, that venue was properly laid in the Southern District in any event. We overrule the government's answer as to waiver but sustain its answer on the merits. Gross contends in the alternative that a new trial should be directed because of certain questions allowed to be asked him on cross-examination, and also because of what he claims to have been an improper answer by the Court to a question from the jury after the jury had begun its deliberations. We uphold the former contention and therefore do not reach the second.

We shall deal first with the government's claim that Gross waived any objection to venue in the Southern District by his delay in making this.

The claim would be well founded if this were a civil case where the privilege as to venue "is of such a nature that it must be asserted at latest before the expiration of the period allotted for entering a general appearance or challenging the merits." *Commercial Casualty Ins. Co. v. Consolidated Stone Co.*, 278 U. S. 177, 179-80 (1929). However, no similar time limitation on the making of the objection exists in criminal cases where questions of venue "are not merely matters of formal legal procedure." *United*

States v. *Johnson*, 323 U. S. 273, 276 (1944), but of constitutional right. As said by Judge Minton, as he then was, in *United States* v. *Jones*, 174 F. 2d 746, 748 (7th Cir. 1949), "One of the things the Government has the burden of proving is venue. It is an essential part of the Government's case. Without it, there can be no conviction. U. S. Const. Amend. VI * * *," and further a "motion for acquittal made at the conclusion of all the evidence properly raised the question of venue." *Accord*, *United States* v. *Brozen*, 225 F. 2d 751, 755 (7th Cir. 1955).

The bundle of legal principles grouped under the term "waiver" thus has an exceedingly narrow application when a criminal defendant claims the government has failed to prove proper venue. Indeed, our opinions show rather that this is limited to what would be more accurately described as election, *i.e.*, to cases where the conduct of a defendant who has been put on notice that the government will not prove proper venue in the district of the indictment indicates that he is nevertheless willing to be tried there. We have found such an indication where lack of proper venue appeared on the face of the indictment (*United States* v. *Jones*, 162 F. 2d 72 (2d Cir. 1947)), and have said we might find it where lack of intention to prove proper venue appeared from statements by the government during the trial, see *United States* v. *Michelson*, 165 F. 2d 732, 734 (2d Cir.), *aff'd.*, 335 U. S. 469 (1948), or where defendant specified the grounds for a motion for acquittal but omitted mention of improper venue, see *United States* v. *Brothman*, 191 F. 2d 70, 73 (1951).

This was not such a case. The various counts of the indictment charged that "in the Southern District of New York, Harold Gross * * * did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America * * * by preparing and causing to be prepared

and by filing and causing to be filed with the District Director of Internal Revenue at Brooklyn, New York [or in Count VI, at Jacksonville, Florida], a false and fraudulent joint income tax return * * *" Since the indictment alleged that the returns had not only been prepared in but filed from the Southern District, there was no basis for Gross' moving against it for improper venue, *United States* v. *Albanese*, 224 F. 2d 879 (2d Cir.), *cert. denied* 350 U. S. 845 (1955); he was entitled to await the government's case and to move when the government failed to prove that all the elements charged to have taken place in the Southern District in fact occurred there. *United States* v. *Michelson*, *supra*; *United States* v. *Brothman*, *supra*.

The government supports venue in the Southern District under 18 U. S. C. § 3237, providing that "Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued or completed." It relies on *United States* v. *Albanese*, *supra*, and *United States* v. *Miller*, 246 F. 2d 486 (2d Cir.), *cert. denied* 355 U. S. 905 (1957), where venue was sustained under that section. Neither is decisive here. In *Albanese*, an income tax evasion case, everything save the actual receipt of the returns took place in the district where the defendants were charged; and in *Miller*, a false statement prosecution, the statements were made up and mailed in the district of the indictment, and only the receipt was elsewhere. Here, on the contrary, there was no evidence that Gross filed the returns from a place in the Southern District.

Nevertheless we believe venue was properly laid in that district. "By utilizing the doctrine of a continuing offense, Congress may * * * provide that the locality of a crime shall

extend over the whole area through which force propelled by an offender operates." *United States* v. *Johnson*, *supra*, at 275. The intent of Congress to avail itself of this prerogative was emphasized when, in the 1948 revision of the Criminal Code, four years after the *Johnson* decision, it altered the language of what is now 18 U. S. C. § 3237, from that of the Judicial Code of 1911, ch. 231, § 42, 36 Stat. 1100, "begun in one district and completed in another," by adding the words "or committed in more than one district." The return is basic to Federal income taxation. As stated in § 601.602 of the Treasury Regulations, "All internal revenue taxes which are not collected by stamps are assessed and collected through the self-determination and self-application of the law and the regulations by taxpayers. The tax return forms are the instruments through which this is accomplished." The forms, prescribed in accordance with § 6011 of the Internal Revenue Code of 1954, include a declaration by the preparer, if other than the taxpayer, under the penalties of perjury, that to the best of his knowledge the return is true, correct and complete based on all the information that he has.

The government's proof was that Gross sent incomplete and therefore untrue and incorrect information to the preparer in the Southern District; that the preparer thereupon prepared and attested returns in that district, which, while true on the basis of the information given him, were in fact false; and that he mailed them in the Southern District to Gross who then used them without change. This was enough to make the Southern District an "area through which force propelled by an offender operates." True no crime was "completed" in the Southern District. But it cannot be said the crime was neither "begun" nor "committed in part" there and was committed solely in a district where Gross and his wife simply signed and mailed the return and the Director received it.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, *Appellee*, v. HAROLD GROSS, ALSO KNOWN AS HARRY GROSS, *Appellant*.	

Petition for Rehearing

Petition for rehearing denied.

C. M.
S. R. W.
H. J. F.
U. S. C. J. J.

February 21, 1961.